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NO. 88-1295 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioner

v.

LEROY JACKSON,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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LIST OF ALL PARTIES

The parties are Texas Employers' Insurance Association and Leroy Jackson.

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To The Honorable Justices Of The United States Supreme Court:

COMES NOW Respondent Leroy Jackson, and files this, his Brief in Opposition to Texas Employers' Insurance Association's Petition of Certiorari to the United States Court of Appeals for the Fifth Circuit, and in support thereof would respectfully show unto this Honorable Court the following:

I.

STATEMENT OF THE CASE

Leroy Jackson seriously injured his back and leg in July 1978 while working as a shipfitter at Gulfport Shipbuilding's shipyard in Port Arthur, Texas. He filed a claim under the Longshore and Harbor Workers' Compensation Act (hereinafter referred to as "LHWCA"). Texas Employers' Insurance Association (hereinafter referred to as "T.E.I.A.") was the insurance carrier for Jackson's employer.

During the time T.E.I.A. handled his claim, Jackson was the victim of egregious misconduct. The details of the conduct are, for the purposes of this appeal, irrelevant. Basically, T.E.I.A. employees knowingly engaged in fraudulent and deceptive conduct in an effort to terminate Jackson's compensation benefits and starve Jackson into taking a small settlement.

Jackson survived T.E.I.A.'s economic warfare. He ultimately tried his LHWCA compensation case after going approximately one year without any benefits. The administrative law judge (ALJ) found Jackson totally and permanently disabled.

After trial, but before the ALJ issued her decision, Jackson brought a separate lawsuit in state district court in Jefferson County, Texas. Jackson sought damages from T.E.I.A. under seven separate and distinct state causes of action for its misconduct in handling his claim. Among the seven were violations of Texas statutes regulating insurance companies, violations of common

law duties and allegations of fraud and intentional misconduct.

Jackson filed the state suit in May 1984. The parties engaged in extensive discovery and the state court preferentially set the case for trial in late August 1985. Early in the litigation T.E.I.A. filed a Plea in Bar. In this motion T.E.I.A. asserted that the LHWCA pre-empted Jackson's state causes of action. After a December 1984 hearing the state court rejected this argument and denied T.E.I.A.'s Plea in Bar.

Shortly before the state court trial was set, T.E.I.A. filed suit in federal district court seeking an injunction permanently enjoining Jackson from prosecuting his state action and a declaratory judgment that the LHWCA pre-empts Jackson's state causes of action. The district court heard arguments and, on August 21, 1985, entered an order enjoining Jackson from further prosecuting his claim against T.E.I.A. in state court. In September 1985 the district court permanently enjoined Jackson from prosecuting his state court action and declared that the LHWCA pre-empts all state causes of action. Jackson appealed this ruling to the United States Court of Appeals for the Fifth Circuit. After a panel upheld the declaratory judgment, the court, sitting en banc, reversed and held that the district court should not have issued either the injunction or the declaratory judgment. The Fifth Circuit declined to address the merits of T.E.I.A.'s pre-emption claim.

II.

REASONS FOR NOT GRANTING THE WRIT

1. THE ANTI-INJUNCTION ACT PROHIBTS THE ISSUANCE OF AN INJUNCTION IN THIS CASE.
2. THERE IS NO FEDERAL QUESTION JURISDICTION SO THAT A DECLARATORY JUDGMENT CAN BE ISSUED IN THIS CASE.
3. A DECLARATORY JUDGMENT SHOULD NOT BE ISSUED WHEN THE ANTI-INJUNCTION ACT PROHIBITS ISSUING AN INJUNCTION.
4. THE DISTRICT COURT SHOULD HAVE ABSTAINED FROM DECIDING THIS CASE.
5. THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT DOES NOT PRE-EMPT STATE CAUSES OF ACTION FOR BAD FAITH HANDLING OF CLAIMS.

III.

ARGUMENT IN SUPPORT OF DENYING THE WRIT

1. THE ANTI-INJUNCTION ACT PROHIBTS THE ISSUANCE OF AN INJUNCTION IN THIS CASE.

The Anti-Injunction Act, 28 U.S.C. Section 2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a state court except

> as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Id. This Act serves as a statutory prohibition barring federal courts from restraining state court proceedings unless the injunction falls within one of the three specifically defined exceptions. *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 286 (1970). The Act's purpose is to forestall the inevitable friction between state and federal courts that ensues following a federal court's enjoining of a state judicial proceeding. *Oklahoma Packing Company v. Oklahoma Gas & Electric Company,* 308 U.S. 4, 9 (1940). This prohibition "is not to be whittled away by judicial improvisation." *Amalgamated Clothing Workers of America v. Richman Brothers Company,* 348 U.S. 511, 514 (1955). T.E.I.A. seeks to rely on two of the Act's exceptions to justify an injunction. The Fifth Circuit correctly held that neither is applicable.

T.E.I.A. claims that an injunction in this case is "expressly authorized" by the LHWCA. In order for a statute to fit within this exception it need not contain an express reference to the Anti-Injunction Act, nor need it use the words "this act expressly authorizes enjoining state court proceedings". *Mitchum v. Foster,* 407 U.S. 225, 237 (1972). An Act of Congress falls within this exception if it creates a specific and uniquely federal right or remedy enforceable in a federal court of equity, that could be frustrated if the federal courts were not empowered to enjoin state court proceedings. *Id.; Vendo Company v. Lektro-Vend Corp.,* 433 U.S. 623 (1977).

It is not enough, however, that state court proceedings "interfere with a protected federal right or invade an area pre-empted by federal law, even when the interference is unmistakably clear." *Atlantic Coast Line Railroad Company,* 398 U.S. at 294 (1970). In order to justify finding that a statute contains an expressly authorized exception to the Anti-Injunction Act, a court must find that Congress explicitly recognized that state courts would, or would be used by others to, invade areas protected by federal law and that the only way to give federal law its full meaning and scope is to allow enjoining such state court proceedings. In both *Mitchum* and *Vendo Company* this Court looked to the legislative history to determine whether the statutes involved fell within this exception. In *Mitchum* the legislative history of the Civil Rights Act, 42 U.S.C. Section 1983, made it clear that Congress intended to authorize such injunctions. *Mitchum,* 407 U.S. at 242. In *Vendo Company* the plurality concluded the legislative history of the Clayton Act, 15 U.S.C. Section 26, indicated Congress had no concerns about state courts being used as instruments to deny citizens their rights and thus declined to authorize the enjoining of state court proceedings. *Vendo Company,* 433 U.S. at 632, 633.

Nowhere in the LHWCA is there any language referring to the Anti-Injunction Act. Nowhere within the four corners of the LHWCA is there any language permitting an insurance company to enjoin a claimant's state court proceedings. Nowhere in the legislative history is there one single word indicating a legislative concern that state courts might be used to deny parties their rights under the LHWCA. Nowhere in the Congressional

Record is there any indication that Congress intended the LHWCA to serve as a basis for enjoining state court proceedings. T.E.I.A.'s invocation of this exception to the Anti-Injunction Act is without foundation. The LHWCA is not an Act of Congress that expressly authorizes the enjoining of state court proceedings.

T.E.I.A.'s second contention is that an injunction is proper because it is necessary "to protect or effectuate" a judgment of a court of the United States. The purpose of this exception is "to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal courts." *Chick Kam Choo v. Exxon Corp.*, ____U.S.____, 108 S. Ct. 1684, 1690 (1988). This exception requires two elements—a judgment of a court of the United States and issues that have been litigated. Neither is present in this case.

The phrase "court of the United States" is defined in 28 U.S.C. Section 451. It encompasses a variety of courts. It does not include, however, administrative law judges in the Executive Branch of government. Rulings of administrative law judges in the Department of Labor are not judgments of a "court of the United States." Thus, Administrative Law Judge O'Shea's ruling cannot provide a basis for enjoining the state court proceedings. *Cf. T. Smith & Son, Inc. v. Williams,* 275 F.2d 397 (5th Cir. 1960) (ruling by Deputy Commissioner of Department of Labor insufficient to justify enjoining state court).

Additionally, in order to support an injunction under this exception, the party seeking the injunction must make a "strong and unequivocal showing" of re-litigation. *In Re Corrugated Container Anti-Trust Litigation,* 659

F.2d 1332, 1334 (5th Cir. 1981), *cert. denied,* 456 U.S. 936 (1982). The re-litigation exception is narrow and only claims or issues which have actually been decided, as reflected in the language of the prior order, are protectable. *Chick Kam Choo,* 108 S. Ct. at 1690. The burden of proof to make this showing is on T.E.I.A. T.E.I.A. never offered any proof on this issue because such proof does not exist. The claims made in the state action were not litigated before the administrative law judge. The reason for this is that the administrative law judge could not award any relief for the deceptive and fraudulent handling of an LHWCA claim. *See, Miller v. Central Dispatch, Inc.,* 16 B.R.B. Serv. 63 (January 6, 1984). One cannot have issue or claim preclusion where the plaintiff was unable to seek certain relief due to limitations of the first tribunal. *United States v. Radio Corporation of America,* 358 U.S. 334 (1959); RESTATEMENT (Second) JUDGMENTS Section 83, comment g; 17 C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure,* Sections 4412 and 4475 (1978). In short, there is no applicable exception to the Anti-Injunction Act that would support an injunction in this case.

Even if there was an applicable exception, there was no basis for issuing an injunction. State court proceedings may not be enjoined unless the moving party demonstrates it will suffer irreparable injury and that it does not have an adequate remedy at law in the state courts. *Duke v. Texas,* 477 F.2d 244 (5th Cir. 1973). There is certainly no evidence of irreparable harm in this case. *See, e.g., Sampson v. Murray,* 415 U.S. 61 (1974); *Morgan v. Fletcher,* 518 F.2d 236 (5th Cir. 1975). Further T.E.I.A. failed to plead or prove that it lacked an adequate remedy at law in state court. Indeed, it is beyond

doubt that T.E.I.A. had an adequate remedy in state court. *See, e.g., Lamb Enterprises, Inc. v. Krioff,* 549 F.2d 1052 (6th Cir. 1977).

The Fifth Circuit correctly held that an injunction was improper. The Anti-Injunction Act prohibits issuing an injunction in this case. Further, T.E.I.A. did not establish the essential elements for the granting of an injunction, irreparable harm and lack of an adequate remedy in state court.

2. THERE IS NO JURISDICTION TO ENTER A DECLARATORY JUDGMENT IN THIS CASE.

The Declaratory Judgment Act does not provide a basis for jurisdiction. *Skelly Oil Company v. Phillips Petroleum Company,* 339 U.S. 667, 671-2 (1950). T.E.I.A. bases jurisdiction on 28 U.S.C. Section 1331. This statutory provision provides for what is known as federal question jurisdiction. This statute, however, requires that the "right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully v. First National Bank,* 299 U.S. 109, 112 (1936). This doctrine, the well-pleaded complaint rule, provides that a federal court may not take federal question jurisdiction of a case if the federal issue is raised only as a defense. *Louisville & Nashville Railroad Company v. Motley,* 211 U.S. 149 (1908). Federal question jurisdiction may not be based on a federal defense, including pre-emption, even if the defense is the only issue in the case. *Franchise Tax Board of California v. Construction Laborers Vacation Trust,* 463 U.S. 1, 14 (1983). With regard to declaratory judgments, the court must focus on the

character of the *threatened state court action,* and not the defense, in determining whether there is federal question jurisdiction. *Public Service Commission of Utah v. Wycoff Company,* 344 U.S. 237, 248 (1952).

Application of the rule in this case indicates there is no federal question jurisdiction. Federal law arises only in T.E.I.A.'s pre-emption claim. Jackson's state law suit contains no federal cause of action. In these circumstances, there is no federal question jurisdiction.

In an effort to avoid this lack of jurisdiction, T.E.I.A. seeks to rely on *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists,* 390 U.S. 577 (1968) and *Metropolitan Life Insurance Company v. Taylor,* 481 U.S. 58, 107 S. Ct. 1542 (1987). These two cases create an exception where Congress has so completely pre-empted an area that any complaint arising from such a claim is deemed to be federal in nature. *Id.*

T.E.I.A. misconstrues *Avco* and *Taylor.* It is not the obviousness of the pre-emption defense that creates this exception. It is the Congressional intent to make causes of action arising under a statute removable to federal court that gives rise to the exception. *Taylor,* 107 S. Ct. at 1547-48.

There is no statutory language in the LHWCA similar to that found in ERISA or LMRA, the statutes focused on in *Taylor* and *Avco.* There is no legislative history or manifestation of Congressional intent to make Jackson's state causes of action removable to federal court. *See, Lowe v. Ingalls Ship Building, a Division of Litton Systems, Inc.,* 723 F.2d 1173 (5th Cir. 1984). Absent a clear Congressional intent to create removal jurisdiction,

the appropriate step is to remand to state court. *Taylor,* 107 S. Ct. at 1548. (Brennan, J. concurring).

There is no jurisdiction to support the issuance of a declaratory judgment in this case. The well-pleaded complaint rule prohibits a finding of jurisdiction. Neither *Avco* nor *Taylor* provide an independent basis for jurisdiction. Once the injunction was refused, the case should have been dismissed for want of jurisdiction.

3. WHEN THE ANTI-INJUNCTION ACT PROHIBITS AN INJUNCTION, A DECLARATORY JUDGMENT SHOULD NOT BE ISSUED.

The Anti-Injunction Act prohibits the issuance of an injunction in this case. Issuing a declaratory judgment when an injunction is improper is clearly inappropriate. *See, Ahrensfeld v. Stephens,* 528 F.2d 193, 197 n. 6 (7th Cir. 1976). The reason is quite simple. If a declaratory judgment has any *res judicata* effect, it will bind the parties. Thus, the effect of a declaratory judgment would be the same as if the court had issued an injunction. Allowing a federal court to issue a declaratory judgment when the Anti-Injunction Act prohibits issuing an injunction would be to judically overrule the Anti-Injunction Act. *See, California v. Grace Brethern Church,* 457 U.S. 398 (1982) (where the Tax Injunction Act prohibits an injunction, a declaratory judgment should not be issued). As counsel for T.E.I.A. wrote, "if a declaratory judgment would have essentially the same effect as an injunction, it should be refused if the injunction would be barred by Section 2283 [The Anti-Injunction Act]." 17 C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedures* Section 4222, p. 316

(1978). Since the Anti-Injunction Act prohibits an injunction in this case, the Fifth Circuit correctly concluded that a declaratory judgment was also improper.

4. THE DISTRICT COURT SHOULD HAVE ABSTAINED FROM DECIDING THIS CASE.

The doctrine of abstention on grounds of federalism was first set forth in *Younger v. Harris,* 401 U.S. 37 (1971). This doctrine was recently re-examined in civil cases in *Pennzoil Company v. Texaco, Inc.,* ____U.S.____, 107 S. Ct. 1519 (1987). There this court held that *Younger* abstention applied in civil cases where "the state's interest in the proceedings is so important that exercise of the federal judicial power would disrupt the comity between the states and the national government." *Id.* at 1526.

Jackson's state court action raises important state interests. The first is the state's interest in being able to decide constitutional issues. This has long been recognized as an important state interest. *Robb v. Connolly,* 111 U.S. 624 (1884). The second interest is the state's interest in having its court's orders, such as the denial of T.E.I.A.'s Plea in Bar, either followed or challenged through state appellate courts up to the United States Supreme Court. *Pennzoil Company,* 107 S. Ct. at 1527 n. 12. This is a corollary of the doctrine that lower federal courts should not become state appellate courts. *See, Rooker v. Fidelity Trust Company,* 263 U.S. 413 (1923).

Additionally, there is another factor present here that implicates both state and federal interests — forum shopping. *See, Pennzoil Company,* 107 S. Ct. at 1533 (Marshall, J. concurring). This case presents a classic example

of forum shopping. T.E.I.A. proceeded in state court until it got a ruling it did not like. It then decided to see if a different court might give it a different ruling. By filing a pleading seeking an injunction and pending a declaratory judgment action to it, T.E.I.A. has successfully obtained a second bite at the apple in a different forum. This is exactly the kind of conduct that federal courts have sought to discourage. Abstention was appropriate in this case.

5. THE LHWCA DOES NOT PRE-EMPT STATE CAUSES OF ACTION FOR BAD FAITH HANDLING OF CLAIMS.

Leroy Jackson brought this action against Petitioner T.E.I.A. in state court on several different grounds. One of Jackson's causes of action is under Article 21.21 of the Texas Insurance Code, a statute expressly designed to regulate insurance companies. Tex. Ins. Code Ann. Art. 21.21, Section 1 (1985). In 1945, in the McCarran-Ferguson Act, 15 U.S.C. Section 1011, *et seq.*, Congress stated that regulation of insurance companies is left to the states. 15 U.S.C. Section 1010(a). "No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." *Id.* T.E.I.A. contends that the LHWCA is an act that pre-empts Texas insurance regulation.

The initial question is whether the LHWCA is an act that specifically relates to the business of insurance. The Act itself is not solely limited to insurance companies. It governs the conduct of self-insured employers,

as well as insurance companies. *See,* 33 U.S.C. Section 935 (1982). Since the LHWCA regulates companies other than insurance companies, it is not an act that relates to the business of insurance. *See, Pilot Life Insurance Company v. Dedeaux,* 481 U.S. 41 (1987). In these circumstances, the McCarran-Ferguson Act prevents pre-emption.

T.E.I.A. contends that the nature of the LHWCA and the maritime law is such that, regardless of the McCarran-Ferguson Act, the LHWCA pre-empts state insurance regulation. Federal law may pre-empt state law in three distinct ways. *See, Michigan Canners and Freezers Association, Inc. v. Agricultural Marketing Bargaining Board,* 467 U.S. 461, 469 (1985). The ultimate question in any pre-emption analysis, however, is what was Congress' intent. *Malone v. White Motor Corp.,* 435 U.S. 497, 504 (1978).

In determining Congress' intent, the area being pre-empted is important. If the field in issue has traditionally been occupied by the states, the assumption is that the federal law was not designed to effect pre-emption unless that is the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). Insurance regulation has historically been left to the states and there is no clear and manifest Congressional intent to pre-empt state law with the LHWCA.

The LHWCA does not expressly pre-empt state law. An example of this type pre-emption is found in the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Section 1001, *et seq.* Section 514(a) of ERISA provides that ERISA "pre-empts any and all state laws in so far as they may now or hereinafter relate

to any employee benefit plan" covered by ERISA. This is the type provision necessary to constitute express pre-emption. *Jones v. Rath Packing Company,* 430 U.S. 519, 525 (1977). Given the absence of such language, it is clear there is no express pre-emption.

Congress has not indicated an intent for the LHWCA to occupy the entire field of regulation. Indeed, in *Sun Ship, Inc. v. Pennsylvania,* 447 U.S. 715 (1980), this Court addressed the issue of whether the LHWCA pre-empted state worker's compensation acts. The Court expressly rejected this argument and held the LHWCA "supplements rather than supplants, compensation laws." *Id.* at 720. Given that state compensation laws are not pre-empted by the LHWCA, it can hardly be argued that the LHWCA evinces a Congressional intent to occupy the entire field of regulation. Certainly no Congressman, Senator or court has ever stated that one of the purposes of the LHWCA is to pre-empt all state insurance regulation.

T.E.I.A. offers no legislative history to support its argument. Instead, it focuses on the detailed nature of the Act's regulation of the payment of compensation benefits. Based upon this statutory detail, T.E.I.A. reaches the conclusion that Congress intended to pre-empt state insurance regulation.

This type argument has previously been rejected by this Court. The Court recognizes that modern social and regulatory legislation often requires detailed responses from Congress, without Congress necessarily intending its enactments to pre-empt all state law. *New York Department of Social Services v. Dublino,* 413 U.S. 405, 415 (1973). "[M]erely because the federal pro-

visions were sufficiently comprehensive to meet the needs identified by Congress did not mean that states and localities were barred from identifying additional needs or imposing further requirements in the field." *Hillsboro County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985). The comprehensiveness of the LHWCA provides no indication that pre-emption was the intent of Congress.

Additionally, contrary to T.E.I.A.'s assertion, regulations issued by the Department of Labor do not support the conclusion that Congress intended to pre-empt state law. This Court has historically been reluctant to infer pre-emption from federal regulations. *Id.* at 717. If an agency intends for its regulations to be pre-emptive, "we can expect they will make their intentions clear. . . ." *Id.* at 718. The Department of Labor has never indicated an intent to pre-empt state insurance laws. Indeed, it is doubtful that a division of the Executive branch could overrule the McCarran-Ferguson Act with a provision in the federal regulations.

Finally, Texas insurance law does not stand as "an obstacle to the accomplishment of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The Texas Insurance Code does nothing more than impose on an insurance carrier the duty to deal with claimants in good faith. Carriers cannot engage in deceptive conduct, act fraudulently or lie. T.E.I.A. seeks a declaration that Congress has authorized such conduct and that Texas law stands as an obstacle to T.E.I.A. engaging in these actions. Not only has Congress never recognized the right to act deceptively or fraudulently, but it has expressly stated that it expects the parties to an LHWCA claim to act in good faith.

> All parties should approach the compensation system in *good faith* with the objective of ensuring that the disabled worker receives the compensation to which he or she may be entitled due to the work-related injury or disease. Misrepresentation of material facts [by insurance companies] deny claimants justice under the Act and present an unnecessary and costly burden on the compensation system.

House Rep. No. 98 - 570, Part I, p. 12 (1984) (emphasis added). Thus Texas law requiring good faith conduct by insurance companies is in line with Congressional policy. Texas law promotes the goals set forth by Congress and does not inhibit them.

This Court reached a similar conclusion with regard to the nuclear power industry in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). The issue before the Court in that case was whether state punitive damage laws were pre-empted by federal laws regulating nuclear safety. Previously the Court had held that Congress intended the federal government to regulate the radiological safety aspect of the construction and operation of nuclear power plants. *Pacific Gas Electric Company v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983). Despite the fact that the area was one for federal regulation, this Court allowed recovery under state law of punitive damages.

In allowing this recovery the Court noted that it was not impossible to pay both federal regulatory fines and civil punitive damage awards. It further saw no conflict between federal regulation of nuclear energy and allowing recovery of punitive damages for a plaintiff's injuries. In this case there is no conflict between the federal law, which allows for criminal penalties against an insurance

company employee who engages in improper conduct, 33 U.S.C. Section 931(c) (1984), and state law, which allows for the imposition of punitive damages on an insurance company where an employee engages in improper conduct. Leroy Jackson's causes of action against T.E.I.A. under the Texas Insurance Code are preserved by federal law. The LHWCA does not pre-empt these actions.

IV.

CONCLUSION

The Court should deny T.E.I.A.'s Petition for Writ of Certiorari and affirm the en banc holding by the United States Court of Appeals for the Fifth Circuit. Leroy Jackson asks for all other just relief to which he is entitled.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I, the undersigned hereby certify that a true and correct copy of RESPONDENT'S RESPONSE IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT was served upon counsel for Petitioner, Reagan Wm. Simpson, Fulbright & Jaworski, 1301 McKinney, Houston, Texas 77002, on the 27 day of April, 1989, via hand-delivery. All parties to be served have been served.

RICHARD SCHECHTER
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